

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HOWARD CLARK)	
)	
SANDRA BAXTER)	
)	
ILLA SWEETLAND)	
)	184,431
)	183,919
TOM D. OSBORNE)	184,379
)	
Claimants)	
VS.)	
)	
DRIVE AWAY EXPRESS, INC.)	
)	
LACY REGEHR MOTORS)	
Respondents)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the 28th day of June, 1994, the applications of the Workers Compensation Fund and of respondent Drive Away Express, Inc., for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge Shannon S. Krysl, dated April 4, 1994, came on for oral argument.

**HOWARD CLARK
SANDRA BAXTER
ILLA SWEETLAND
TOM D. OSBORNE**

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APPEARANCES

Claimants Howard Clark, Sandra Baxter, and Illa Sweetland, appeared by and through their attorney, W. Walter Craig of Wichita, Kansas. Claimant Tom D. Osborne, appeared by and through his attorney, Randy S. Stalcup of Wichita, Kansas. The respondent, Drive Away Express, Inc., an uninsured corporation, appeared by and through its attorney, Robert S. Fuqua of Wichita, Kansas. Lacy Regehr Motors appeared by and through its attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

These four docketed claims have been consolidated for hearing purposes. The record before the Appeals Board is the same as that considered by the Administrative Law Judge and consists of the deposition testimony of Howard Clark, Sandra Baxter, Phil Haight, and Illa Sweetland, all taken on February 11, 1994, including exhibits attached to those depositions and the pleadings filed of record.

ISSUES

The Kansas Workers Compensation Fund appeals the decision of the Administrative Law Judge finding for purpose of preliminary hearing that claimants are not independent contractors, that at the time of their accidental injuries they were all employees of respondent Drive Away Express, Inc., and that they were not statutory employees of respondent Lacy Regehr Motors. Respondent Drive Away Express, Inc., also appeals the finding that the claimants were employees of Drive Away Express, Inc. The issues as presented for determination by the Appeals Board are as follows:

- (1) Whether on the date of accident the claimants were independent contractors under Kansas law;
- (2) Whether the claimants were employees of Drive Away Express, Inc.; and,
- (3) Whether the claimants were statutory employees of Lacy Regehr Motors.

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These issues can also be framed as whether the claimants' injuries arose out of and in the course of their employment with Drive Away Express, Inc., and/or Lacy Regehr Motors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We first address the issue of whether the Appeals Board has jurisdiction to review this appeal from a preliminary order. Although not characterized as such in the Application for Review filed by the Workers Compensation Fund nor in the Notice of Appeal filed by respondent Drive Away Express, Inc., we find that this appeal does raise as a disputed issue whether the accidental injuries arose out of and in the course of the employees' employment. This is an issue specifically listed in K.S.A. 44-534a as one which shall be considered jurisdictional and subject to review by the Appeals Board on appeal from a preliminary hearing order.

We now turn to the specific questions of whether claimants were independent contractors, employees of Drive Away Express, Inc., and/or statutory employees of Lacy Regehr Motors. After review of the entire record and consideration of the briefs and arguments made by counsel, the Appeals Board finds for purposes of preliminary hearing that claimants have proven by a preponderance of the credible evidence that they were employees of respondent Drive Away Express, Inc., and not independent contractors under Kansas law. Furthermore, based upon the evidence in the record as it currently exists, we find that the evidence is insufficient to establish that claimants are statutory employees of Lacy Regehr Motors.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge Shannon S. Krysl, in her Preliminary Hearing Order dated April 4, 1994, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

HOWARD CLARK
SANDRA BAXTER
ILLA SWEETLAND
TOM D. OSBORNE

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Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Randy S. Stalcup, 2831 E. Central, Wichita, KS 67214
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Shannon S. Krysl, Administrative Law Judge
George Gomez, Director